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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74- 74-5174

JOHN WALLACE EBERHEART, JR.

Petitioner,

-v.-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered on April 30, 1974, rehearing denied, May 21, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at ___Ga.___, 206 S.E.2d 12 (1974) and is set out in Appendix A hereto, pp. 1a-8a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on April 30, 1974, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crimes of rape and kidnapping under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the provisions for appellate review of death sentences established by the new Georgia capital punishment statute, Georgia Laws, 1973, pp. 159-172, Act No. 74, violate the rights of an indigent defendant to the effective assistance of counsel guaranteed by the Sixth Amendment of the Constitution of the United States and to the Due Process of Law and Equal Protection of the Laws guaranteed by the Constitution of the United States?

3. Whether the exclusion for cause of two veniremen on the grounds of their expressed attitudes toward the death penalty violated petitioner's rights under the Sixth or Fourteenth Amendment of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia:

Ga. Code Ann. §26-1311

> "Kidnapping (a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.
> . . . .
> A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years: Provided that a person convicted of kidnapping

> for ransom shall be punished by life imprisonment or by death; and Provided, further, that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death."

Ga. Code Ann. §26-2001

> "Rape. A person commits rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years. No conviction shall be had for rape on the unsupported testimony of the female."

Ga. Code Ann. §26-3102

> "Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. §27-2302 (1973)

> "Recommendation to mercy. In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall mean imprisonment for life."

Ga. Code Ann. §27-2514

"Sentence of death; copy for penitentiary-superintendent. Time and mode of conveying prisoner to penitentiary. Expenses.-Upon a verdict or judgment of death made by a jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of a new trial, or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of county commissioners, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county."

Ga. Code Ann. §27-2534.1

"Mitigating and aggravating circumstances; death penalty.-(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the[statutory] aggravating circumstances enumerated in Code section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. §27-2537

"Review of death sentences.-(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision,

and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Georgia Laws, 1973, p. 162, Act No. 74

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed.

The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

Georgia Laws, 1973, p. 171, Act No. 74

"Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in Code section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking."

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia, entered on April 30, 1974, affirming petitioner's death sentences. Petitioner, John Wallace Eberheart, Jr., a black man, was sentenced to die on December 10, 1973, in the Cook County Superior Court of Georgia, upon convictions for the kidnapping and the rape of Mrs. Lucille Frances Jones.

The details of the kidnapping and rape were proven largely by the testimony of Mrs. Jones, a twenty-five year old white woman who was travelling from her former home in Michigan to join her husband in Florida. Mrs. Jones was driving on I-75 in southern Georgia near Adel at about 7:30 p.m. on July 13, 1974, when her right front tire blew out. She waited for help and then attempted unsuccessfully to change the tire.

After it had grown dark, at about 9:00 p.m., a white car containing petitioner, two black males (John Wesley Hooks and Eddie Dean Anderson) and two unidentified white males drove up and stopped behind her. Hooks and Anderson asked if they could help her change the tire, but because she was frightened, she refused their aid and asked them instead to go and send someone else back to help her.

About twenty to thirty minutes later, the white car pulled up behind her again and stopped with its lights on, six feet away. The white males were no longer in the car. Anderson warned

her not to struggle because "there ain't anybody going to help you," T. 117, and petitioner and Hooks grabbed her and began dragging her toward the white car, hitting and kicking her in an attempt to overcome her resistance. Mrs. Jones testified that "I screamed I fought I clawed I bit I kicked -- I tried to gouge Hooks eyes out. I did him (indicating [petitioner]) an elbow -- right in the guts." T. 122. The two men forced her into the back seat of the white car, and Anderson drove away. Petitioner, however, was left behind near Mrs. Jones' car.

Anderson drove for a short distance, turning off I-75 and proceeding onto another highway, while Hooks struggled in the back seat with Mrs. Jones. She testified that Hooks began choking her in an effort to quiet her down and threatened to kill her unless she stopped fighting. T. 124-125. When the car stopped, Hooks dragged her out of the car by the hair, striking her and pulling her across the asphalt road into a nearby woods. Anderson drove off, and Hooks raped her, forced her to commit oral sodomy, and then raped her again. Anderson then returned with petitioner, and Mrs. Jones testified that petitioner had intercourse with her:

> Q [Vickers Neugent, District Attorney] In what area?
> A [Mrs. Lucille Frances Jones] Where one would normally have intercourse.
> Q I will ask you if he entered your vaginal area?
> A Yes, sir, that's right. Now, he, apparently could not have an erection. He was trying and he was muttering to himself, "I can't get it up -- I can't get it up -- I can't get it up." So, he got up -- crawled up me -- put his two legs around my throat, and he says -- his pants were unzipped -- and he pulled his penis out and he says, "you lick this, you" -- and, I was just so frightened I just sat there. Well, he jammed it in my mouth and all of a sudden he looked at me, and apparently, he got disgusted, because he couldn't get an erection, and he said, "I can't fuck this honky bitch -- I can't and he got up and he zipped up his pants and he started waving his arms and he said, "I want no part of it -- I want no part of it -- I want no part of this. I can't fuck this honky bitch." (T. 127).

Mrs. Jones testified that Anderson then raped her, returned her clothes and told her to go into the woods. She ran through the woods and into a cornfield, eventually coming to the trailer home of Mrs. Sue Vining in a trailer park on the Moultrie Highway.

Mrs. Vining, her daughter, Mrs. Carolyn Castleberry, and her son-in-law, Mr. Finley Castleberry, all testified that Mrs. Jones came to the trailer at about 11:20 p.m., July 13, looking "real scared and upset," T. 42, and "hysterical," T. 34. She appeared to be limping and was bruised and bleeding from several cuts and abrasions. Mrs. Jones declared, "I've been raped and I've been beat up," T. 41, and asked these witnesses to "Call the police, or call somebody." T. 35. Mrs. Vining recalled that Mrs. Jones said she had been beaten and raped by "three black men." T. 46.

A deputy sheriff took Mrs. Jones to the hospital, where medical tests subsequently revealed the presence of live semen and acid phosphates in her vagina, indicating sexual intercourse within the last 72 hours. A medical expert testified that these tests did not reveal whether the semen of more than one male was present nor whether the semen was the result of more than one act of sexual intercourse. T. 73. Testimony and photographs revealed that Mrs. Jones had suffered a dislocated jaw, a broken nose, a concussion, a torn ear lobe, broken teeth, a split lip, temporary abdominal injuries, bruises, abrasions, "pavement burns," and red ant bites during the evening of July 13.

Cook County Deputy Sheriff J. W. Snead interviewed Mrs. Jones at the hospital that night and received from her a description of her three assailants. Mrs. Jones informed him that he would find her Kotex sanitary napkin at the rape scene, and he also noticed that her right gold earring was missing. Deputy Snead subsequently found both the earring and sanitary napkin in a woods near Adel, Georgia, not far from the Vining trailer, in a "wallowed out area" between two stumps. T. 98.

Petitioner was tried simultaneously for the rape and kidnapping of Mrs. Jones. During the selection of the jury, the State examined veniremen regarding their attitudes toward capital punishment. Over petitioner's objection, two veniremen were excluded for cause on account of death scruples.[1/]

Petitioner testified under oath in his own defense.[2/] At the conclusion of the evidence, the trial court charged the jury that it could find him either guilty or not guilty of rape, and of kidnapping. The jury found petitioner guilty of both charges.

A sentencing hearing was then held, at which neither the State nor petitioner introduced any evidence. The District Attorney declared that "[t]he State will not introduce additional evidence, but will rely upon the evidence of aggravation which existed in the main trial." T. 185. The trial court charged the jury that it "was authorized to consider imposing a sentence of death for rape," T. 187, if it found:

> "No. 1, the offense of rape was outrageously violent and horrible in that it involved torture to the victim; No. 2, the offense of rape was committed while the offender was in the commission of another capit[a]l felony, to-wit: forcibly kidnapping the person of Lucille Frances Jones, and the said Lucille Frances Jones having received bodily injury." (Ibid.)

The court instructed that:

> "In arriving at your determination as to what sentence is appropriate, you are authorized to consider all of the evidence received here in Court, presented by the State and the defendant, throughout the trial before you. You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation." (Ibid.)

The jury was further instructed that it could decide to recommend a death sentence for kidnapping if it found:

> "one or more of the following aggravating circumstances: (1) The offense of kidnapping was committed while the offender was in the commission of another capital felony, to-wit: forcibly raping the person of Lucille Frances Jones, and the said Lucille Frances Jones having received bodily injury; (2) The offense of kidnapping was outrageously and wantonly violent, horrible and

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1/ W. E. Kretlow, T. 4-5; W. H. Day, T. 12-13.

2/ He stated that he had been with Hooks and Anderson on the night of July 13 and that they had picked up two white hitch-hikers. They had stopped to see if they could help Mrs. Jones fix her tire, but when she had refused their assistance, they had driven away, and let out the hitch-hikers. Petitioner testified that without his foreknowledge or consent, Hooks and Anderson had abducted Mrs. Jones and he had been left behind. When Anderson returned for him, he entered the car again because he wanted a ride home. Anderson then drove him to the woods where he saw Hooks with Mrs. Jones. Petitioner denied striking or raping Mrs. Jones or touching her in any way at any time during the evening. On cross-examination, petitioner admitted that he was arrested on July 30 and that he had not reported the incident to the police in the period between July 13 and July 30.

John Wesley Hooks was sentenced to die for rape in Cook County Superior Court by Judge H. W. Lott after a plea of guilty was entered on December 10, 1973. State v. Hooks, Cook County Superior Ct. No. 9859. This case is now pending in the Georgia Supreme Court. Hooks v. State, No. 29103 (1974 Term). Eddie Dean Anderson was convicted of rape on November 10, 1973 and sentenced to die pursuant to the recommendation of a sentencing jury, State v. Anderson, Cook County Superior Ct. No. 9854. Defendant Anderson's motion for a new sentencing proceeding was granted, but this proceeding has not as yet been conducted.

inhuman, in that it involved torture and depravity of mind." (T. 189)

The jury announced its sentencing verdict in open court: "'We the jury, recommend death'," and "'We, the jury, recommend death'." T. 190. It found two "aggravating circumstances" to justify its death verdict for rape:

> "The offense of rape was outrageously violent and horrible and it involved torture to the victim; the offense of rape was committed while the offender was in the commission of another capital felony, to-wit: forcibly kidnapping the person of Lucille Frances Jones, and the said Lucille Frances Jones having received bodily injury" (T. 191),

and two to justify its death verdict for kidnapping:

> "The offense of kidnapping was . . . committed while the defendant was in the commission of another capital felony, to-wit: forcibly raping the person of Lucille Frances Jones, the said Lucille Frances Jones having received bodily injury.
>
> "The offense of kidnapping was outrageously and wantonly violent, horrible and inhuman in that it involved torture and depravity of mind." (T. 190.) 3/

3/ The verdict forms returned by the jury stated:

> "We, the Jury, recommend death. We find the following aggravating circumstances:
> (1) The offense of rape was outrageously vile and horrible in that it involved torture to the victim.
> (2) The offense of rape was committed while the offender was in the commission of another capital felony, to-wit: Forcibly kidnapping the person of Lucille Frances Jones, and the said Lucille Frances Jones having received bodily harm."

and

> "We, the Jury, recommend death. We find the following aggravating circumstances:
> (1) The offense of kidnapping was committed while the offender was in the commission of another capital felony, to-wit: forcibly

The trial court thereupon sentenced petitioner to die.

On April 30, 1974, the Georgia Supreme Court, with one Justice dissenting on the ground that the Georgia capital punishment statute was unconstitutional, affirmed petitioner's convictions and death sentences. The Court denied rehearing on May 21, 1974, with one Justice dissenting. 4/

3/ cont'd.

> raping the person of Lucille Frances Jones and the said Lucille Frances Jones having received bodily injury.
> (2) The offense of kidnapping was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind."

4/ The court did not issue a stay of execution to enable petitioner to file a petition for certiorari in this Court. However, petitioner's death sentence provided that petitioner should "be put to death by electrocution at the State Penitentiary of Georgia 15 days after the filing of the remittitur of the Supreme Court of Georgia in the Clerk's Office of Cook Superior Court." In a letter to defense counsel dated May 28, 1974, the Clerk of the Georgia Supreme Court advised:

> "The remittitur in the . . . case will be held at least 90 days from May 21, 1974, the date of the denial by this Court of the motion for rehearing.
>
> If a petition for the writ of certiorari is filed in the Supreme Court of the United States, the remittitur will also be held past the 90 days and until a ruling is made there IF you will notify this office when such petition is filed and of further developments in the case as they occur."

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Before trial petitioner moved "to declare Georgia Code Sections 27-2534.1 and 26-3102 (Ga. Laws 1973, page 159, et seq.) . . . unconstitutional . . . . in that they violate the VIII and XIV amendment to the Constitution of the United States of America." This motion was denied by the trial court. In the court below, petitioner's Enumeration of Error No. 1 asserted that "[petitioner's] death sentences, imposed pursuant to Georgia Laws, 1973, pp. 159-172, Act No. 74, are unconstitutional, cruel and unusual punishments under the rule of Furman v. Georgia, 408 U.S. 238 (1972)." This issue was briefed and rejected by a majority of the Supreme Court of Georgia, Eberheart v. State, __Ga.__, 206 S.E.2d 12, 15 (1974) (App. A, infra, at 4a). Petitioner again raised this issue in ¶1 of his petition for rehearing, but this petition was denied.

II. In support of a timely rehearing petition, petitioner urged the following grounds:

> "2. The standard of appellate review utilized by this Court in State v. Coley, No. 28131 (March 8, 1974) and in the instant case magnif[ies] the unconstitutionality of the new Georgia capital punishment statute under Furman v. Georgia, supra, since this standard utilizes some of the very pre-Furman cases in which the death penalty was found to be "freakish" 408 U.S. at 310 (opinion of Mr. Justice Stewart) and "arbitrary" 408 U.S. at 256 (opinion of Mr. Justice Douglas) in Furman. This reliance on an unconstitutional standard perpetuates the error originally condemned by the United States Supreme Court. See Lane v. Wilson, 307 U.S. 268 (1939).
> 3. Furthermore, the standard of appellate review utilized by this Court under the new Georgia capital punishment statute is arbitrary and defective in that it considers only those cases in which a conviction was appealed. A standard which uses only appellate cases as a basis for comparison ignores all of the rape cases

> in which plea bargaining occurred and a plea of guilty was accepted for a lesser offense or for a sentence of less than death for rape and all those cases in which a life sentence was imposed and no appeal was taken. This procedure creates a double sentencing standard in violation of United States v. Jackson, 390 U.S. 510 (1968) and arbitrarily denies persons sentenced to death the benefit of having their sentences measured against those imposed in all similar prior cases . . . .
> 5. Since the standard of appellate review articulated in Coley v. State, supra, requires the Court to analyze the "evidence and sentence . . .[in] previous cases" and to consider the "factual situations and . . . aggravating circumstances" in previous cases, (Coley v. State, supra, slip op. at 15), appellant is denied both equal protection and due process of law under the Fourteenth Amendment to the United States Constitution, see Griffin v. Illinois, 351 U.S. 12 (1956), since he is unable, as an indigent, to obtain the records in the cases which this Court is using as a standard of review. The appellate reports of these cases, which are available to appellant, frequently do not disclose the factual circumstances of the conviction and sentence, and provide an inadequate basis of comparison."

The rehearing petition was denied.

III. During selection of petitioner's jury, defense counsel made a contemporaneous objection to the exclusion of two veniremen for cause on account of their conscientious scruples against the death penalty. T. 5,13. In the court below, petitioner's Enumerations of Error asserted:

> "2. The exclusion from the jury which determined appellant's guilt of veniremen with conscientious scruples against the death penalty violated appellant's rights under the due process and equal protection clauses of the United States Constitution.
> 3. The trial court failed to apply properly the standards of Witherspoon v. Illinois, 391 U.S. 510 (1968), and erroneously allowed the exclusion for cause of veniremen who had scruples concerning capital punishment.
> 4. Exclusion of death-scrupled veniremen on the panel from which appellant's jury was selected violated appellant's Sixth Amendment right to a jury which reflects a fair and representative cross section of the community."

This issue was briefed and rejected by a majority of the Supreme Court of Georgia, Eberheart v. State, __Ga.__, 206 S.E.2d 12, 15-16 (1974)(App. A, infra, at 4a-5a). Petitioner again raised this issue in ¶6 of his rehearing petition, but this petition was denied.

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIMES OF RAPE AND KIDNAPPING UNDER THE LAW OF GEORGIA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The Perpetuation of Arbitrary Selectivity Under the New Georgia Capital Punishment Statute.

On June 29, 1972, this Court invalidated the capital punishment laws of the State of Georgia and held that the death penalty could no longer be imposed under a statutory scheme which permitted its arbitrary, rare and discriminatory use. Furman v. Georgia, 408 U.S. 238 (1972). In the wake of Furman v. Georgia, the Georgia legislature modified its death penalty statutes, and petitioner and at least sixteen other defendants 5/ have been condemned for murder, armed robbery, kidnapping, and rape under these procedures. The question presented here is whether the modifications wrought by the Georgia legislature are substantial enough to meet the minimum requirement of Furman v. Georgia --

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5/ State v. Anderson, Cook County Superior Ct. No. 9854 (Nov. 10, 1973)(rape); State v. Coley, __Ga.__, 204 S.E.2d 512 (1974)(death sentence for rape vacated);State v. Coleman, Seminole County Superior Ct. No. 439 (Jan. 18, 1974)(murder); State v. Dungee, Seminole County Superior Ct. No. 444 (Jan. 9, 1974)(murder); State v. Floyd, Fulton County Superior Ct. No. A-19628 (April 10, 1974)(murder and armed robbery); State v. Hooks, Cook County Superior Ct. No. 9859 (Dec. 10, 1973)(rape); State v. House, __Ga.__, 205 S.E.2d 217 (1974)(death sentence for murder affirmed); State v. Isaacs, Seminole County Superior Ct. No. 449 (January 3, 1974)(murder); State v. Jarrell, Gwinnett County Superior Ct. No.95107 (March 14, 1974)(kidnapping, armed robbery, murder); State v. McCorquodale, Fulton County Superior Ct. No. A-20205 (April 12, 1974)(murder); State v. Ross,Colquitt County Superior Ct. No.51-71 (March 13, 1974)(murder); State v. Stack, Fulton County Superior Ct. No.A-18379 (Dec. 6, 1973(murder); State v. Dobbs, Walker County Superior Ct. No. 8403 (May 22, 1974)(murder); State v.

that the most extreme penalty known to contemporary man not be imposed arbitrarily.[6]

Once this Court has determined the existence of unconstitutional practices, it has heretofore invalidated subsequent contrivances and evasions which seek to perpetuate such practices in new guises. Cf. Guinn v. United States, 238 U.S. 347 (1915) with Lane v. Wilson, 307 U.S. 268 (1939). The Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." Lane v. Wilson, supra, at 275. As will be demonstrated infra, death sentences are still "wantonly and . . . freakishly imposed," Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring) in Georgia, and the statutory modifications

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5/ cont'd.

Prevatte, Gwinnett County Superior Ct. No. 9558 (June 14, 1974) (murder); State v. Jordan, Gwinnett County Superior Ct. No. 9557 (June 14, 1974) (murder); State v. Brown, Jefferson Davis Superior Ct. No. 2544 (June 5, 1974) (murder).

In Georgia, many condemned defendants are incarcerated in a local jail until the Georgia Supreme Court has reviewed their conviction. Since not all prisoners under sentence of death are confined in a central location, accurate determination of the number of the condemned is somewhat difficult.

6/ The submissions in subsections I-B and I-C, pp. 47-48 infra, draw upon broader aspects of the Furman holding than the minimum requirement stated in the text here. As this subsection, I-A, pp. 19-46 , infra, demonstrates, however, the present case presents a capital procedure which so clearly violates that minimum requirement that the Court need not necessarily consider here those broader aspects.

of 1973 provide "no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not." Id. at 313 (Mr. Justice White, concurring).

The new Georgia law provides a bifurcated trial for the administration of the death penalty for rape and kidnapping.[7] See generally Coley v. State, __Ga.__, 204 S.E.2d 612 (1974). After the jury or judge returns a verdict or finding of guilty or after a plea of guilty to one of these crimes, a sentencing hearing is conducted before the jury or judge, and at this hearing, "the jury or judge shall hear additional evidence in extenuation, mitigation and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of such prior convictions and pleas." Ga. Laws 1973, p. 162, Act No. 74.[8] The State may present only such evidence in aggravation as it has made known in advance to the defendant.

The judge is to consider or to include in his instructions to the jury "any mitigating circumstances or aggravating circumstances otherwise authorized by law and . . . statutory aggravating circumstances which may be supported by the evidence." Ga. Code Ann. §27-2534.1(b). The "statutory aggravating circumstances" for which the death penalty may be imposed in rape and kidnapping

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7/ The new law also provides a potential death penalty for the crimes of murder, armed robbery, treason and aircraft hijacking.

8/ This section was modified in certain minor respects by Ga. Laws, 1974, p. 355-358, Act No. 854, which also provided that the section would be designated Ga. Code Ann. §27-2503.

cases are:

> "(1) The offense of . . . rape, . . . or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of . . . rape, . . . or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (3) The offender by his act of . . kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> * * *
>
> (7) The offense of . . . rape, . . . or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

Ibid. What, if any, additional "aggravating circumstances" are "otherwise authorized by law" is obscure. "Mitigating circumstances are not defined or enumerated at all.

The jury may -- but need not -- impose a death sentence in a rape or kidnapping case when it finds beyond a reasonable doubt a "statutory aggravating circumstance." For to condemn a defendant, it must also make a "recommendation of death."[9] Ga. Code

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9/ At the time of petitioner's trial, Ga. Code Ann. §27-2302 provided:

> "In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall mean imprisonment for life."

Sec. 27-2302 was part of Georgia's capital-sentencing laws before

Ann. §27-2534.1(c). See Ga. Code Ann. §26-3102.[10]

Provision is made for the filing of a standardized form of "report" by the trial judge in capital cases where the death penalty is imposed and for direct automatic appeal to the Georgia Supreme Court. Ga. Code Ann. §27-2537. General guidelines for review are provided,[11] and the Georgia Supreme Court is empowered to affirm the death sentence or to set it aside and remand the

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cont'd.

9/ Furman v. Georgia, and was not amended by the 1973 statute, whose provisions (Ga. Code Ann. §§26-3102, 27-2534.1(c)) were consistent with it. In 1974, the phrase "and shall mean imprisonment for life" was deleted and was replaced by "and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge." Ga. Laws, 1974, p. 353, Act No. 854.

10/ In cases of aircraft hijacking or treason, the jury is not required to find a statutory "aggravating circumstance" to condemn a defendant; the death sentence is or is not imposed depending on whether the jury makes or does not make a recommendation of death. Ga. Code Ann. §27-2534.1(a).

11/ The Court is directed to consider "the punishment as well as any errors enumerated by way of appeal" in a case where a death sentence has been imposed and to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Ga. Code Ann. §27-2537(c). If the court affirms a death sentence, it"shall include in its decision a reference to those similar cases which it took into consideration." Ga. Code Ann. §27-2537(e).

case for resentencing. Ibid.

Executive discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated.

The discrepancy between the regularity and even-handedness constitutionally required in capital sentencing and the unpredictable arbitrariness which results from the modified Georgia procedures can only be appreciated after analysis of the various selective mechanisms which operate before, during, and after sentencing of defendants charged with crimes potentially punishable by death. For the imposition of a death sentence in Georgia remains an extraordinarily rare and fortuitous event not only because judges and juries so often seize the opportunity for mercy offered in sentencing discretion, but also because a death sentence signifies that a defendant has missed each of the many opportunities for a lesser disposition.

1. Pre-Sentence Selective Mechanisms

Arbitrary selection operates well before sentencing to spare a substantial portion of Georgia capital defendants, although others similarly situated are ultimately sentenced to death. The principal importance of these pre-sentence selective mechanisms is that they provide an arbitrary sparing for all but a relative handful of defendants originally charged with capital crimes. But this screening out process is also significant because it effectively nullifies a key device upon which the new statute purportedly relies for the control of arbitrary discretion -- comparative review in the Georgia Supreme Court -- by limiting the base of the comparison to a fraction of the eligible population. See pp. 55-57, infra.

i. Prosecutorial Discretion

The impact of the district attorney's discretion on the administration of criminal justice in Georgia is enormous and is unaffected by the new capital punishment statute: "Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."[12/] In Georgia, the decision to prosecute and the choice of charges for which indictment will be sought are left to the district attorney's absolute, unguided discretion. The district attorney's mandate is simply

12/ Note, Prosecutorial Discretion, 21 DE PAUL L. REV. 485, 486 (1971-1972).

"to prosecute all indictable offenses." Ga. Code Ann. §24-2908(4). In petitioner's case, for example, indictment might reasonably and responsibly have been sought for any one or any combination of the following crimes: rape (Ga. Code Ann. §26-2001), attempted rape (Ga. Code Ann. §§26-1001, 26-2001), aggravated sodomy (Ga. Code Ann. §26-2002), attempted aggravated sodomy (Ga. Code Ann. §§26-1001, 26-2002), kidnapping (Ga. Code Ann. §26-1311), attempted kidnapping (Ga. Code Ann. §§26-1001, 26-1311), false imprisonment (Ga. Code Ann. §26-1308), or attempted false imprisonment (Ga. Code Ann. §§26-1001, 26-1308), aggravated assault (assault with intent to commit rape, Ga. Code Ann. §26-1302), attempted aggravated assault (Ga. Code Ann. §§26-1001, 26-1302). The decision to prosecute petitioner for two capital crimes, (rape and kidnapping), one of which nearly always involves the other,[13] in a system where one feature that renders each crime potentially capital is its commission "while the offender was engaged in the commission of another capital felony," Ga. Code Ann. §27-2534.1(b)(2), is a striking example of the extent to which arbitrary prosecutorial decision-making may, quite literally, mean the difference between life and death.

13/ See note 26, infra.

The district attorney also has great discretion to enter a judgment of nolle prosequi. He must obtain the consent of the court,[14] but the standards for granting or denying such consent are nowhere specified. Ga. Code Ann. §27-1801.

Furthermore, the district attorney's discretion to plea bargain -- a process by which an estimated ninety per cent of all criminal cases are resolved[15] -- is utterly unfettered by the new capital punishment statute, or by any other significant restriction.[16] The fact that capital cases are likely to take up a great deal of time in preparation and trial makes them particularly likely to be settled by plea bargaining.[17] The peculiar harshness of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error and increases the pressure to settle a capital case by a negotiated guilty plea:

14/ Once the case has been submitted to the jury, the district attorney must also obtain the consent of the defendant to enter a nolle prosequi. Ga. Code Ann. §27-1801.

15/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

16/ See Thomason v. Caldwell, 229 Ga. 637, 194 S.E.2d 112 (1972).

17/ Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U.CHI. L. REV. 50, 55 (1966).

> "Since time immemorial [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a . . . [capital] trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an appellate court." 18/

See Caldwell v. Paige, 230 Ga. 456, 197 S.E.2d 692 (1973) (plea bargain made after death sentence reversed).

ii. Jury Discretion

Although the new Georgia capital punishment statute expressly confers sentencing discretion upon the trial jury following conviction, see pp. 32-36 infra, that is not the first or only means available to the jury to spare the defendant's life in cases where, if otherwise disposed, it might choose to sentence him to die. At the first stage of Georgia's bifurcated trial, the jury may convict him of a lesser offense, or it may recognize some amorphous and subjectively defined defense and acquit him altogether.

A Georgia trial judge must charge lesser included offenses when they are established under any view of the evidence, Sims v. State, 203 Ga. 668, 47 S.E.2d 862 (1948) and may give such a charge "where, from the evidence or from the defendant's statement at the trial, there is anything deducible which would tend to show that he was guilty of [the lesser offense] . . . or which would be sufficient to raise a doubt as to which of these grades [of the offense] . . . was committed." Echols v. State, 46 Ga.

18/ Bedau, Death Sentences in New Jersey, 19 RUTGERS L. REV. 1, 30 (1963).

668, 168 S.E. 790 (1933)(emphasis in original), citing Reeves v. State, 22 Ga. App. 628, 97 S.E. 115 (1918). Moreover, a charge regarding a lesser offense is essentially immune from appellate scrutiny even though it is entirely inconsistent with the evidence presented at trial, Williams v. State, 204 Ga. 837, 51 S.E.2d 825, 830 (1949).

The jury may convict of criminal attempt even though the crime was consummated, Ga. Code Ann. §26-1004, and despite the prosecutor's failure to charge the crime of attempt, Ga. Code Ann. §26-1005. It may convict of an assault with intent to commit a crime even though the crime was consummated, Ga. Code Ann. §26-1303. 19/

19/ Prior to 1968 the Georgia Criminal Procedure Code provided that a person could not be convicted of an attempt or of an assault with intent to commit a crime if the intended crime was actually perpetrated. Ga. Code Ann. §27-2508(1967). It had therefore been held that conviction of a lesser crime involving attempt was unauthorized where the evidence established that the attempt was consummated. See Hicks v. State, 86 Ga. App. 365, 71 S.E.2d 695 (1952); Pack v. State, 93 Ga. App. 737, 92 S.E.2d 824 (1956). The new Georgia Criminal Code provides, however, that "[a] person may be convicted of criminal attempt if the crime attempted was actually committed in pursuance of the attempt" (Ga. Code Ann. §26-1004) and that "[a] person may be convicted on [sic] an assault with intent to commit a crime if the crime intended was actually committed as a result of the assault." Ga. Code Ann. §26-1303. See, Jones v. Smith, 228 Ga. 648, 187 S.E.2d 298 (1972).

Similarly, dicta in older cases which suggest that conviction for the crime of robbery by intimidation would be unauthorized where the use of an offensive weapon had been proved, see e.g. Daniels v. State, 219 Ga. 381, 133 S.E.2d 357, 360 (1963), are seemingly superceded by 1968 amendments which removed the requirement that the crime of robbery by intimidation be committed without the use of such a weapon, compare former Ga. Code Ann. §26-2503(1967) with present §§26-1901 and 26-1902, and specifically provided that "[t]he offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery." Ga. Code Ann. §26-1902.

The jury is thus given considerable unreviewable discretion -- contingent, of course, upon the exercise of discretion by the trial court in the choice of crimes on which the jury will be instructed [20] -- to convict a capital defendant of a lesser offense, not only in cases where the distinctions between crimes or degrees of offense are blurred, but also in cases where conviction of the lesser offense would be wholly inconsistent with the facts proved.

A jury may also be instructed to acquit on the basis of necessarily speculative and imprecise determinations regarding the state of the defendant's mind at the time of the crime. Acquittal is authorized when, at the time of the alleged crime, the defendant "lacked the mental capacity to distinguish between right and wrong," Ga. Code Ann. §26-702, suffered "a delusional compulsion . . . which overmastered his will," Ga. Code Ann. §26-703, or was acting on the basis of "a misapprehension of fact, which, if true, would have justified the act", Ga. Code Ann. §26-705. [21] Acquittal may also be based upon prescribed justifications, the determination of which involves not only findings as to the defendant's state of mind at the time of the crime, but also judgments as to the reasonableness of the defendant's conduct. Such judgments will inevitably vary with

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20/ See note 27, infra.

21/ Both rape, Ga. Code Ann. §26-2001, and kidnapping, Ga. Code Ann. §26-1311, involve acts committed "against [the] will" of the victim, and since consent would be a defense to both crimes, a defendant charged with rape or kidnapping might attempt to prove a "misapprehension of fact" justification with regard to consent.

the mores of the deciders. Justification is a defense defined in vague, subjective terms in a variety of enumerated situations (Ga. Code Ann. §§26-901(a)-(e), 902-904, 906) and is also allowed "[i]n all instances which stand upon the same footing of reason and justice as those enumerated . . . ." Ga. Code Ann. §26-902(f) (emphasis added). The fluid nature of these concepts, which are "notoriously refractory to the best-instructed human understanding," [22] as Justice Cardozo recognized long ago when analyzing the distinction between first and second degree murder, affords the jury an indirect "dispensing power" of mercy vouchsafed them "in a mystifying cloud of words." [23]

22/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289,299 (1971).

23/ CARDOZO, LAW AND LITERATURE (1931) 99.

2. Sentencing Discretion

Once a Georgia defendant has been convicted of a capital crime, the sentencer has absolute discretion to impose a sentence of life imprisonment, since the procedure of finding "aggravating" and "mitigating" circumstances at the second stage of a bifurcated proceeding does not -- and was not intended to -- confine the unfettered power of the sentencer to spare the life of a sympathetic capital defendant.[24] See Furman v. Georgia, 408 U.S. 238, 401 (1972)(Mr. Chief Justice Burger, dissenting). The finding of a statutory "aggravating circumstance" and no "mitigating circumstances" does not compel a sentencing jury to impose a death sentence, because the statute also requires the jury to make a "recommendation of death," Ga. Code Ann. §§26-3102, 27-2534.1(c).[25]

24/ See C. Brewster, The Georgia Death Penalty Statute - Is It Constitutional, Even After Revision? 3 GA. J. CORR. 14, 18 (Winter, 1974).

25/ The intent of the statute to confer this discretion on the sentencing jury is made explicit by examination of Ga. Laws, 1973, p. 171, Act No. 74, which prohibits a trial judge from imposing a death sentence in a rape or kidnapping case after the defendant has pleaded guilty unless the trial judge finds one of the "statutory aggravating circumstances," but which also provides that the "judge . . . may, in his discretion, . . . sentence such person to life imprisonment, or to any lesser punishment authorized by law for the offense named in the indictment." Ibid.(emphasis added). Thus, although the trial judge may not sentence to death a defendant who pleads guilty without finding a "statutory aggravating circumstance," he still has complete unfettered discretion not to impose the death penalty. Plainly, the legislature intended the sentencing jury to exercise a similar discretion, for the procedure would otherwise be in violation of United States v. Jackson, 390 U.S. 570 (1968). See Comment, Constitutional Law-Capital Punishment-Furman v. Georgia and Georgia's Statutory Response, 24 MERCER L. REV. 891, 931 (1973).

The particular "aggravating circumstances" specified in the statute are extremely vague, all-encompassing, and open to different interpretations in like cases, depending upon the subjective judgment of the sentencer. Terms like "substantial history of serious assaultive criminal convictions," Ga. Code Ann. §27-2534.1(1), creation of a "great risk of death to more than one person," Ga. Code Ann. §27-2534.1(3), and use of a "weapon or device which would normally be hazardous to the lives of more than one person" id., are extremely imprecise and leave great freedom to the trial judge or jury to define their content. In addition to the great vagueness of these phrases, their coverage is extraordinarily broad. To allow the sentencer to impose a death penalty if the crime of rape or kidnapping is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," Ga. Code Ann. §27-2534.1(7), is potentially to authorize capital punishment for any rape or kidnapping.[26] Furthermore, the list

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26/ The great breadth of the new statute's potential coverage is also illustrated by the fact that one of the "statutory aggravating circumstances" found by the jury in this case (that the rape occurred during the course of a kidnapping) may be found in almost any rape case to justify a death sentence. Ga. Code Ann. §26-1311(a) provides that "[a] person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will." Since the new capital punishment statute enumerates "kidnapping" rather than "kidnapping for ransom," as defined in Ga. Code Ann. §26-1311(b), as a "statutory aggravating circumstance," it follows that the forcible detention and momentary abduction which are a part of almost any rape may qualify as a "kidnapping" which authorizes a sentencer to impose the death penalty. See Henderson v. State, 227 Ga. 68, 179 S.E.2d 76, 84-85 (1970).

The finding of an "aggravated battery" is also a "statutory aggravating circumstance" which justifies a jury's death verdict for the crime of murder. Ga. Code §26-1305 defines "Aggravated Battery" as follows:

of statutory "aggravating circumstances" is not exclusive or exhaustive, so that even if the foregoing "aggravating circumstances" did somehow curb the sentencer's discretion, the sentencer is still free to consider any "aggravating circumstances otherwise authorized by law." Ga. Code Ann. §27-2534.1(b). Exactly what this phrase means is obscure but it is clear that there is very little limitation on the nature or scope of evidence in aggravation which may be heard or considered.[27] While

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26/ cont'd.

> "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof."

It appears, therefore, that a jury would be justified in returning a death verdict in any murder case, on the basis of the existence of this "statutory aggravating circumstance."

27/ The ambiguous provisions of the statute which empower the trial judge to instruct upon aggravating and mitigating circumstance magnify the effect of the vagueness of the statutory circumstances themselves in jury trials. The trial judge "shall include" in his instructions "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence." Ga. Code Ann. §27-2534.1(b) (emphasis added). Again, the trial judge is to give such "statutory instructions" as he determines "to be warranted by the evidence" in writing to the jury. Ga. Laws, 1973, p. 165, Act No. 74 (emphasis added). It is not certain whether "supported by the evidence" is equivalent to "warranted by the evidence" and, if it is, it is unclear what the standard is. The trial judge thus has an enormous discretion to present to the jury reasons to impose or not impose the death sentence in the case before it.

the statute sets forth certain factors in aggravation for the jury to consider, it nowhere directs that the jury may not consider other factors in aggravation. The statute does "no more than suggest some subjects for the jury to consider during its deliberations." McGautha v. California, 402 U.S. 183, 207 (1971).

The statute does not define "mitigating circumstances," and the sentencer is therefore free in any case to consider anything a mitigating factor which should justify mercy.[28] There is thus no case at all in which the sentencer might not conclude that some factual element was present which entitled the defendant to a lesser sentence than death.[29]

28/ There is no limitation, see Ga. Laws, 1973, p. 162, Act No. 74, upon the arguments which can be made by the defendant and prosecutor on the issue of punishment:

> "If the purpose of this Act is to strictly limit discretion in sentencing in capital cases, one wonders what must be the purpose of such a wide-open allowance of evidence and arguments in mitigation and aggravation . . . . If the state desires to comport with [Furman] . . . which indicated that . . . discretion might be greatly restricted by limiting considerations to specific, objective, statutorily-prescribed guidelines, why, then, should the hearing of arguments and evidence in mitigation and aggravation remain unrestricted?"

Comment, Constitutional Law-Capital Punishment-Furman v. Georgia and Georgia's Statutory Response, 24 MERCER L. REV. 891, 932 (1973) (emphasis in original).

29/ This was made clear in the instant case when the following colloquy occurred:

> "MR. ENGLISH[Petitioner's counsel]: Your Honor, this law does not spell out what is mitigating circumstances . . . .
>
> THE COURT: Well, mitigating circumstances would be anything that he could show in his own behalf -- in other words, to show mitigation."

T. 185.

In short, under the sentencing provisions of the new Georgia capital punishment statute, any case becomes a possible one for the death penalty or for life imprisonment, and total discretion is left to jurors and trial judges to determine whether any particular defendant shall be put to death. This statute is one in which "the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges and juries the decision as to those cases, if any, in which the penalty will be utilized." Furman v. Georgia, 408 U.S. 238, 310-311 (1972) (Mr. Justice White, concurring).[30]

30/ At the time of Furman v. Georgia, several states had limitations on the jury's discretion to make the life-death choice and standards for the appropriate exercise of that discretion. Death sentences from these states were nevertheless uniformly held unconstitutional. Davis v. Connecticut, 408 U.S. 935 (1972) (see Conn. Gen. Stat. Ann., §53-10); Moore v. Illinois, 408 U.S. 786 (1972) (see People v. Black, 367 Ill. 209, 10 N.E.2d 801, 804 (1937); People v. Sullivan, 345 Ill. 87, 177 N.E. 733 (1933); Ill. Rev. Stat., c. 38, §1-7-(c)(1)); Alvarez v. Nebraska, 408 U.S. 937 (1972) (see Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689, 704 (1951)); Billingsley v. New Jersey, 408 U.S. 934 (1972) (see N. J. Stat. Ann., §2A:113-4(1969); State v. Reynolds, 41 N.J. 163, 195 A.2d 449 (1963)); Duling v. Ohio, 408 U.S. 936 (1972) (see State v. Tudor, 154 Ohio St. 249, 95 N.E.2d 385, 390 (1950); State v. Eaton, 19 Ohio St. 145, 249 N.E.2d 897 (1969)); Herron v. Tennessee, 408 U.S. 939 (1972) (see Tenn. Code Ann., §39-2406 (1955); Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843, 847 (1932)).

3. Post-Sentence Selective Mechanisms

i. Appellate Review

Although this Court, concurrently with Furman v. Georgia, and on its authority, reversed death sentences which had been reviewed by state appellate courts and affirmed on the express ground that the facts and circumstances warranted the extreme penalty,[31] the Georgia legislature has apparently chosen to rely upon a similar review procedure as a response to Furman.

> "[T]he new statute provides for automatic and swift appellate review to insure that the death penalty will not be carried out unless the evidence supports the finding of one of the serious crimes specified in the statute. The statute also requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive. And, finally, the statute requires this court to make certain the record does not indicate that arbitrariness or discrimination was used in the imposition of the death sentence."

31/ See e.g. Alford v. Eyman, 408 U.S. 939 (1972) (see State v. Alford, 98 Ariz. 124, 402 P.2d 551, 557 (1965); Ariz. Rev. Stat., §13-1717); Hurst v. Illinois, 408 U.S. 935 (1972) (see People v. Hurst, 42 Ill.2d 217, 247 N.E.2d 614 (1969)); Alvarez v. Nebraska, 408 U.S. 937 (1972) (see State v. Alvarez, 182 Neb. 358, 154 N.W.2d 746, 748 (1967); Neb. Rev. Stat., §29-2308); Fesmire v. Oklahoma, 408 U.S. 935 (1972) (see Fesmire v. State, 456 P.2d 573, 586-587 (Okla Ct. Cr. App. 1969)); Phelan v. Brierly, 408 U.S. 939 (1972) (see Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540 (1967); cf. Commonwealth v. Hough, 358 Pa. 247, 56 A.2d 84, 85-86 (1948) with Commonwealth v. Edwards, 380 Pa. 52, 110 A.2d 216, 217 (1955)).

The Court reversed death sentences from these states even though these same state appellate courts had a regular and recent practice of reversing death sentences when such sentences were found to be unwarranted upon a consideration of aggravating and mitigating circumstances.

See e.g. State v. Maloney, 105 Ariz. 348, 464 P.2d 793 (1970); People v. Crews, 42 Ill.2d 60, 244 N.E.2d 593 (1969); State v. Hall, 176 Neb. 295, 125 N.W.2d 918 (1964); Lewis v. State, 451 P.2d 399 (Okla. Ct. Crim. App. 1969); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959).

Coley v. State, __Ga.__, 204 S.E.2d 512, 516 (1974). This review process whereby the Supreme Court of Georgia is asked to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," "[w]hether . . . the evidence supports the . . . finding of a statutory aggravating circumstance," and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar . . . cases, considering . . . both the crime and the defendant," Ga. Code Ann. §27-2537(c) in fact exacerbates the arbitrariness of capital sentencing.

First, the vagueness and breadth of the statutory "aggravating circumstances" means that the death penalty can be imposed in virtually any capital case, while the fact that "mitigating circumstances" are undefined means that the jury can find a reason to afford mercy to any capital defendant. Given this enormous statutorily-authorized sentencing discretion, it is difficult to see how the Georgia Supreme Court can determine whether "any . . . arbitrary factor" influenced the sentencing deliberations.

Second, the Georgia Supreme Court's reliance on cases that are appealed [32] as a standard for determining whether a "sentence

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32/ The new Georgia statute requires a trial judge's report only in cases where a death sentence is actually imposed. Ga. Code Ann. §27-2537(a). The statute also directs the Georgia Supreme Court to "accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate," Ga. Code Ann. §27-2537(f). Preparation of a formal appellate "record" occurs, of course, only in those cases which are appealed, and it is purely fortuitous whether defendants sentenced to life in cases factually like those of any particular condemned defendant will choose to appeal. In the three death sentences thus far reviewed by the Georgia

of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Ga. Code Ann. §27-2537(c)(3), will provide no reliable guide to whether the death penalty is being uniformly imposed under similar factual circumstances. A comparative sample consisting only of cases appealed to the Georgia Supreme Court is drastically skewed in two ways. Otherwise eligible cases are ignored which involve similar factual circumstances but which were disposed of by various selective mechanisms described above (for example, the case of a co-defendant convicted of assault with intent to rape). See pp. 25-31, supra. No account is taken of those capital crime convictions where a life sentence is imposed and no appeal is taken (for example, the case of a co-defendant who pleaded guilty to rape in return for a life sentence). The myopia inherent in this scheme will prevent ascertainment of the penalties normally imposed in particular circumstances. [33]

32/ cont'd.

Supreme Court, the required list of "similar cases which [the Court] . . . took into consideration," Ga. Code Ann. §27-2537(e), has contained only capital convictions which were subjected to appellate review. See Coley v. Georgia, __Ga.__, 204 S.E.2d 512, 618 (1974); House v. State, __Ga.__, 205 S.E.2d 217, 222-223 (1974); Eberheart v. State, __Ga.__, 206 S.E.2d 12, 18 (1974)(App.A at 7a).

33/ See C. Brewster, The Georgia Death Penalty Statute -- Is It Constitutional, Even After Revision? 3 GA. J. CORR. 14, 19 (Winter, 1974) for hypothetical examples of the inequities produced by this form of appellate review.

Third, the appellate review provisions of the new statute explicitly authorize comparison of death sentences with sentences in pre-Furman v. Georgia cases tried under procedures which this Court has already condemned because they lent themselves to arbitrary and discriminatory application. The Georgia Supreme Court is directed to consider "capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate," Ga. Code Ann. §27-2537(f), and all but one of the cases listed in the "Similar cases considered by the court" appendices of the three death cases reviewed by the Georgia Supreme Court under the new statute were decided under statutes whose death penalty procedures were invalidated by Furman v. Georgia.[34] The result of course, is a perpetuation of the Eighth Amendment arbitrariness condemned by this Court on June 29, 1972. For post-Furman v. Georgia, death sentences are affirmed or reversed on the basis of their conformity with a "standard" consisting of cases in which the death penalty was "wantonly and . . . freakishly imposed," Furman v. Georgia, supra, at 310 (Mr. Justice Stewart concurring), at a time when "there [was] . . . no meaningful basis for distinguishing the few cases in which it [was] . . . imposed from the many

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34/ See Coley v. Georgia, __Ga.__, 204 S.E.2d 512, 618 (1974); House v. State, __Ga.__, 205 S.E.2d 217, 222-223 (1974); Eberheart v. State, __Ga.__, 206 S.E.2d 12, 18 (1974)(App.A at 7a).

The Coley case itself, listed in the Eberheart appendix, is the only case cited which was not decided under capital procedures which this Court held invalid in Furman because they lent themselves to arbitrary and discriminatory imposition of the death sentence.

cases in which it [was] . . . not," id. at 313 (Mr. Justice White concurring) and when "the discretion of judges and juries in imposing the death penalty enable[d] the penalty to be selectively applied, feeding prejudices against the accused if he [were] . . . poor and despised, lacking political clout, or if he [were]. . . a member of a suspect or unpopular minority." Id. at 255 (Mr. Justice Douglas, concurring).

Finally, the Georgia Supreme Court's failure to provide reasoned opinions in support of its sentence review decisions makes it impossible to determine whether this procedure is fulfilling its ostensible purpose. For in petitioner's case, and in the two other death cases the Court has reviewed under the new statute, the Court has merely asserted that a particular death sentence did (or did not) pass muster under the statutory standards.[35]

35/ The Georgia Supreme Court merely made the conclusory statement that petitioner's death sentence was appropriate under the new statute:

> "In accord with the statutory mandate we have reviewed the trial transcript and record including the evidence and made a comparison with the evidence and sentences in similar cases. Those similar cases we considered in reviewing the case are listed in an appendix attached to this opinion. Using the standards prescribed for our review by the statute, we conclude that the sentences of death imposed in this case were not imposed under the influence of passion, prejudice or any other arbitrary factor, and the evidence supports the jury's finding of statutory aggravating circumstances. Considering both the crime and the defendant, and after comparing the evidence and sentences in this case with that of previous cases, we conclude the sentences of death are not excessive or disproportionate to the penalty imposed in similar cases."

Eberheart v. State, __Ga.__, 206 S.E.2d 12, 18 (1974)(App. A at 7a). At the end of its opinion, the Court attached the following appendix:

In each case, the Court provided a list of cases it had "considered, but it did not articulate any principles which would rationalize the cases, indicate what elements of the case under review mandated (or did not mandate) a death sentence, describe the factual circumstances in cases where the appellate report does not disclose them, explain why certain other cases were not considered, or demonstrate how the facts of the case under review merited a harsher sentence than had been imposed in other cases where

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35/ cont'd.

> "Similar cases considered by this court: Miller v. State, 224 Ga. 627, 163 S.E.2d 730; Henderson v. State, 227 Ga. 68, 179 S.E.2d 76; Ford v. State, 227 Ga. 279, 180 S.E.2d 545; Watson v. State, 227 Ga. 698, 182 S.E.2d 446; Lumpkin v. State, 228 Ga. 391, 185 S.E.2d 770; Fuller v. State, 228 Ga. 546, 186 S.E.2d 688; Allen v. State, 228 Ga. 859, 188 S.E.2d 793; Griffin v. State, 229 Ga. 165, 190 S.E.2d 61; Hobbs v. State, 229 Ga. 556, 192 S.E.2d 903;McCrary v. State, 229 Ga. 733, 194 S.E.2d 480; Grantling v. State, 229 Ga. 746, 194 S.E.2d 405; Massey v. State, 229 Ga. 816, 195 S.E.2d 28; Akins v. State, 231 Ga. 411, 202 S.E.2d 62; Coley v. State, 231 Ga. 829, 204 S.E.2d 612."

206 S.E.2d at 18 (App. A at 72).

apparently more aggravated crimes had received lighter sentences.[36]

36/ Cf. e.g. Penland v. State, 229 Ga. 256, 190 S.E.2d 900 (1972) (appellant received twenty year sentence for rape and aggravated sodomy; when law enforcement officers found the victim:

> "she was almost nude; . . . her head was a complete mass of blood and her body was covered with mud, cuts, and bruises, . . . her eyes were swollen shut; . . . she was incoherent . . . The victim testified in detail as to what had occurred, relating that the defendant by threats and by beating her with his hands, a stick, and a tire tool, forced her to submit to several acts of each of the offenses."

190 S.E.2d at 900-901); Riggins v. State, 226 Ga. 381, 174 S.E.2d 908 (1970)(life sentence for rape reversed for trial error: the "evidence show[ed] the victim was brutally beaten, abused and raped by the [appellant]" and that she was taken to a hospital and "was treated for extensive physical injuries" shortly after the rape. 174 S.E.2d at 912); Bussie v. State, 230 Ga. 440, 197 S.E.2d 344 (1973)(appellant given ten year sentence for rape of ten year old child: victim testified that appellant "placed a knife against her neck and took her to a railroad box car and raped her," 197 S.E.2d at 344); Ford v. State, 227 Ga. 279, 180 S.E.2d 545 (1971) (life sentence for rape: appellant was one of three men committing rape; victim left "disheveled," "hysterical," and suffering "abrasions in the area at the opening of the vagina," 180 S.E.2d at 547); Griffin v. State, 229 Ga. 165, 190 S.E.2d 61 (1972) (life sentence for rape: victim was abducted and "forcibly raped in rapid succession by four or five men, including the [appellant]," 190 S.E.2d at 63); Hobbs v. State, 229 Ga. 556, 192 S.E.2d 903 (1972)(life sentence for rape: appellant found guilty of perpetrating a rape which resulted in "bruises, scratches, abrasions about the [victim's] face, neck and other parts of her body," 192 S.E.2d at 907); Watson v. State, 227 Ga. 698, 182 S.E.2d 446 (1971) (life sentence for rape: appellant subdued his victim with a pistol, handcuffed her to the bed, and raped her: "[s]everal witnesses [described her] as crying, [with] her hair ruffled up, emotionally upset, with bleeding handcuff marks on her hands," 182 S.E.2d at 449). Cf. also Teague v. State, 208 Ga. 459, 67 S.E.2d 467, 469 (1951); Martin v. State, 207 Ga. 482, 62 S.E.2d 158 (1950); Jones v. State, 213 Ga. 814, 102 S.E.2d 21 (1958); Stevens v. State, 222 Ga. 603, 151 S.E.2d 127 (1966); Coleman v. State, 215 Ga. 865, 114 S.E.2d 2 (1960). Of course, these cases may be distinguishable on the basis of facts unascertainable from the reported appellate decisions or by a logic that is not apparent and has not been spelled out by the Georgia Supreme Court. But surely a sentencing-review system is inadequate if it relies on comparisons involving unknowable facts mediated by unarticulated principles. See pp. 49-58, infra.

ii. Executive Clemency

The capital defendant who fails to escape the death penalty during the charging, plea bargaining, guilt determination, and sentencing processes is subjected to a final lottery in which the Executive Department (the three members of the Board of Pardons and Paroles acting with the consent of the Governor) has absolute discretion to spare his life or permit his execution. Georgia Constitution, art. V, §2-3011, par. XI, Ga. Code Ann. §77-511. There are no standards whatsoever for the exercise of the commutation power, and the state courts have "no jurisdiction" to review the grant or denial of a commutation in a death case. Parks v. State, 206 Ga. 675, 58 S.E.2d 142, 145 (1950). In the eighteen years between 1946 and 1963, 41 of 187 condemned prisoners (22%) were spared by executive clemency.[37] In view of the precipitous decrease in the number of executions over the past few decades, it appears reasonable to assume that under the new Georgia death penalty statutes, a significant number of those defendants condemned to die will be spared through the exercise of the freakish mercy of executive clemency.

The preceding review of the post-Furman v. Georgia modifications in Georgia's capital procedures reveals that discretionary opportunities for imposition or avoidance of the penalty are,

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37/ Note, Executive Clemency in Capital Cases, 39 N.Y.U. L. REV. 136, 192 (1964).

in fact, as numerous and as unregulated as in the pre-June 29, 1972 period. It is not surprising that only a handful of defendants have been condemned (17 in 16 months)[38] in a State which reported 871 murders and non-negligent manslaughters, 984 forcible rapes, and 6,340 robberies in the twelve months of 1972.[39] Of course, the point is not only that the death penalty continues to be imposed so rarely in such an insignificant fraction of eligible cases that its regular and even-handed use and its general acceptance as a functioning part of the State's criminal law machinery are called into question. The more fundamental defect is that the arbitrary selectivity condemned in Furman v. Georgia has been carefully preserved in Georgia's modified capital procedures. After Furman, Georgia "was confronted with the serious task of devising a new . . . system consonant with her own political ideas but also consistent with the Federal Constitution." Lane v. Wilson,

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38/ See note 5, supra.

39/ UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1972 (1973) at 69. These totals are reported crimes, not convictions, and they cannot be said to represent the total of murders, rapes, and robberies reported in Georgia in 1972 for which a death sentence might be imposed. The FBI Uniform Crime Reports do not tabulate statistics for reported acts of kidnapping, treason, and aircraft hijacking.

307 U.S. 268, 275 (1938). The question now presented for this Court's consideration is whether the 1973 statute "partakes too much of the infirmity" of the pre-Furman v. Georgia system "to be able to survive." Ibid.

This question is important both to the prisoners condemned under the new Georgia statute and to the resolution of constitutional questions of broad national significance. For the Georgia legislation represents one of the major devices used by retentionist states to avoid the effect of the Furman ruling. Several states have devised more or less elaborate procedures involving "aggravating" and "mitigating" circumstances -- much like those of Georgia described in subsection 2, supra -- for the exercise of disguised arbitrary selectivity in sentencing. Other states, such as North Carolina, have adopted "mandatory" death penalties for grades or kinds of offenses but have built significant discretionary elements into the definition of these capital classifications and have taken no steps to control the kinds of arbitrary selectivity described in subsections 1 and 3, supra. By granting review in this case, and in cases pending on certiorari to the Supreme Court of North Carolina,[40] this Court will have an opportunity to consider the full range of devices now being used in the attempt to reinstitute the death penalty after Furman v. Georgia despite strong national resistance to its frequent and routine application.

40/ Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974); Henderson v. North Carolina, No. 73-6853 (filed June 8, 1974); Noell v. North Carolina, No. 73-6876 (filed June 11, 1974); Jarrette v. North Carolina, No. 73-6877 (filed June 11, 1974); Crowder v. North Carolina, No. 73-6878 (filed June 11, 1974); Fowler v. North Carolina, No. 73-7031 (filed July 9, 1974); Honeycutt v. North Carolina, No. 73-7032 (filed July 9, 1974).

B. The Excessiveness of the Death Penalty for Rape and Kidnapping.

Separate from the issue of arbitrary selectivity in the various processes by which certain capital defendants are chosen to die in Georgia is the question whether the punishment of death is excessive, disproportional, and aberrational for rape and kidnapping. See Weems v. United States, 217 U.S. 349 (1910). To avoid burdening the Court with repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Certiorari to the Supreme Court of North Carolina in Noell v. North Carolina, No. 73-6876 (filed June 11, 1974), at pp. 19-22, attached hereto as Appendix B, pp. 1b-4b, in support of petitioner's contention that a substantial and important question is presented here. It need only be added that the repudiation since Furman v. Georgia of the death penalty for kidnapping, where the kidnap victim is not killed, is perhaps more widespread than the rejection of this penalty for rape. Prior to Furman v. Georgia, thirty state laws and one federal statute provided a possible death penalty for this crime.[41] Now, however, only Georgia, Kentucky, and Louisiana authorize capital punishment for kidnapping, and in the latter two States the death penalty may be imposed only if the victim is found to have suffered significant bodily injury.[42] The freakish rarity of death as a punishment for simple kidnapping is also evident from an international perspective.

41/ BEDAU, THE DEATH PENALTY IN AMERICA (rev. ed. 1967) at 43.

42/ La. Rev. Stat. §14:44; §76(1) of H.B. No. 232 (Reg. Sess. 1974), amending Ky. Rev. Stat. Chap. 507 (eff. Jan. 1, 1975).

In 1963, only four of 128 countries polled reported use of the death penalty for kidnapping: Cambodia, Malaya, and some of the states of Mexico and the United States.[43/] It is against this background of overwhelming national and international rejection of the practice of executing kidnappers that the constitutionality of Georgia's authorization of the death penalty for kidnappping must be evaluated.

C. The Inconsistency of the Death Penalty with Contemporary Standards of Decency.

Pretermitting the questions whether the new Georgia capital punishment statute successfully eliminates arbitrary selectivity in the imposition of the death penalty and whether punishing rape and kidnapping by death is constitutionally excessive, a significant question remains concerning whether this penalty is consistent with contemporary standards of decency embodied in the Eighth Amendment. For the reasons stated in Part I-D of the Petition for Certiorari, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974) at pp. 45-51 (attached hereto as Appendix C), petitioner urges the Court to consider whether the penalty of death violates "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100 (1958)(plurality opinion of Chief Justice Warren).

43/ Patrick, The Status of Capital Punishment: A World Perspective, 56 J. OF CRIM. L., CRIMINOLOGY, AND POL. SCI. 397 (1965).

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROVISIONS FOR APPELLATE REVIEW OF DEATH SENTENCES ESTABLISHED BY THE NEW GEORGIA CAPITAL PUNISHMENT STATUTE, GEORGIA LAWS, 1973, PP. 159-172, ACT NO. 74, VIOLATE THE RIGHTS OF AN INDIGENT DEFENDANT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND TO THE DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The preceding section of this Petition considered the incapacity of Georgia's new appellate review procedures to control or correct the arbitrary capital sentencing practices perpetuated by the State's 1973 death penalty statute in the teeth of Furman v. Georgia. Those appeal procedures are so defective as to raise, in addition, fundamental issues of due process and equal protection and of denial to death-sentenced defendants of the effective assistance of "counsel acting in the role of an advocate," Anders v. California, 386 U.S. 738, 743 (1967), on the question of life or death.

The Georgia Supreme Court is statutorily directed to determine whether a death sentence has been "imposed under the influence of passion, prejudice, or any other arbitrary factor," whether "the evidence supports the jury's or judge's finding of a statutory aggravating circumstance," and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann., §27-2537(c). This mandate

involves the extraordinary feature of an appellate "review" that imports an issue not decided by the lower court and introduces a standard for decision of the appeal which is neither utilized nor utilizable at the trial. For, whereas the Georgia statute nowhere provides any mechanism by which sentencing judges or juries are to ascertain the facts of any cases other than the one before them or to compare that one case with any others, the Georgia Supreme Court is instructed to "accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate," Ga. Code Ann., §27-2537(f); it is authorized to employ a legal assistant to "provide the court with whatever extracted information it desires with respect [to such cases] . . . , including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant," ibid.; and the Georgia Supreme Court, after comparing a condemned appellant's case with "similar cases," Ga. Code Ann. §27-2537(c)(3), is required to "include in its decision a reference to those similar cases which it took into consideration," Ga. Code Ann., §27-2537(e).

Whether or not the Georgia Supreme Court has in fact accumulated records in any or all capital cases -- of what vintage they may be -- whether it has had a legal assistant make any synopses, briefs or extracts -- and, if so, what facts and conclusions they contain -- are all unknown and unknowable. In the three capital cases that it has so far reviewed under the statute, the Georgia Supreme Court has said nothing of any of this, contenting itself with appending to its opinion a list of

earlier cases which it recites that it has "considered."[44] All of those cases are convictions from which appeals were taken resulting in reported decisions, but (1) they do not include all reported decisions in cases of convictions for the particular crime in question following any particular ascertainable date;[45] (2) they include some reported opinions in which the facts surrounding the offense are set forth at length[46] and many in

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44/ See pp. 41-43, supra.

45/ The appendices to the Georgia Supreme Court's opinion in Coley v. State, __Ga.__, 204 S.E.2d 512 (1974) and in petitioner's case did not cite the following rape cases: Penland v. State, 229 Ga. 256, 190 S.E.2d 900 (1972); Riggins v. State, 226 Ga. 381, 174 S.E.2d 908 (1970); Bussie v. State, 230 Ga. 440, 197 S.E.2d 344 (1973); Williams v. State, 226 Ga. 140, 173 S.E.2d 182 (1970); Walker v. State, 226 Ga. 292, 174 S.E.2d 440 (1970). The appendix to the Georgia Supreme Court's opinion in House v. State, __Ga.__, 205 S.E.2d 217 (1974) did not cite the following murder cases: Parks v. State, 230 Ga. 157, 195 S.E.2d 911 (1973); Evans v. State, 227 Ga. 571, 181 S.E.2d 845 (1971); Fisher v. State, 228 Ga. 98, 184 S.E.2d 156 (1971); Banks v. State, 227 Ga. 578, 182 S.E.2d 106 (1971).

46/ See e.g. Watson v. State, 227 Ga. 698, 182 S.E.2d 446 (1971), listed in the appendix to the Georgia Supreme Court's decision in the Coley case and in petitioner's case.

which the facts are described sketchily or not at all;[47] (3) they consist primarily of pre-Furman convictions and sentences and therefore of cases tried under a non-bifurcated procedure in which it would have been wholly adventitious had facts concerning "the defendant"as well as "the crime" been adduced; and (4) the Georgia Supreme Court has not only failed to state the relevant facts of those cases, but has also failed to describe from what source or sources (the appellate opinion, the trial transcript, the trial judge's "report,"[48] the entire trial-court file) it derived those facts.

Such a method of adjudication falls woefully short of anything this Court has ever countenanced in any form of proceeding -- criminal, civil, or administrative -- conducted subject to the Constitution. Several distinct but related constitutional guarantees are flouted here.

First, counsel representing a condemned defendant cannot fairly acquire knowledge of the identity or the facts of the "similar cases" which the Georgia Supreme Court is statutorily

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47/ See e.g. McCrary v. State, 229 Ga. 733, 194 S.E.2d 480 (1972); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968); Grantling v. State, 229 Ga. 746, 194 S.E.2d 405 (1972); Fuller v. State, 228 Ga. 546, 186 S.E.2d 888 (1972); Akins v. State, 231 Ga. 411, 202 S.E.2d 62 (1973), listed in the Appendix to the Georgia Supreme Court's decision in the Coley case and in petitioner's case.

48/ See p. 23, supra.

required to compare to his for the purpose of determining whether his client lives or dies. Neither published opinions nor any other accessible source will enable him to locate in a systematic and comprehensive fashion all of the "similar cases" that should be called to the court's attention by briefing and argument; and, even were the cases somehow to be located, counsel would have no practicable way of obtaining the facts about them that are available to the court, or of knowing or affecting the view that the court takes of those facts or their interpretation or significance.

Counsel for indigent condemned men like petitioner Eberheart are, of course, uniquely disadvantaged, since they lack the resources that would be available to a defendant with means to purchase copies of transcripts in dozens of capital cases for research and comparison. They are therefore denied "the basic tools of an adequate defense or appeal [which] . . . are available for a price to other prisoners," Britt v. North Carolina, 404 U.S. 226, 227 (1971)(dictum), and are denied the equal protection of the laws demanded by an unbroken line of this Court's decisions from Griffin v. Illinois, 351 U.S. 12 (1956), through Mayer v. City of Chicago, 404 U.S. 189 (1971). Lacking access to the "records" which the Georgia Supreme Court will review for comparative purposes, the indigent's statutory right of appellate review of his death sentence (cf. Ross v. Moffitt, 42 U.S.L.W. 4940 (U.S., June 17, 1974)) is reduced to a "meaningless ritual." Douglas v. California, 372 U.S. 353, 358 (1963).

But even for a defendant with means, the appeal of a death sentence involves arguing to the Georgia Supreme Court comparisons of unknown facts under unknowable standards. What synopses of briefs of what versions of what facts in comparative cases are before the court remains unknown to counsel; and the court's standards of comparison as revealed by its opinions and its "Cases Considered" appendices in decisions rendered under the statute (see pp.38-42, supra, at notes 32-35) are about as intelligible as a Roman Emperor's gesture of thumbs-up or thumbs-down beside the arena. "This will never do if hearings and appeals are to be more than empty forms." Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 303 (1937). A judgment based upon "undisclosed sources of information unavailable to others," West Ohio Gas Co. v. Public Utilities Commission (No. 1), 294 U.S. 63, 69 (1935), makes "[t]he right to submit argument . . . a barren one," Morgan v. United States, 304 U.S. 1, 18 (1938), and denies the "'prime requirement of any fair hearing,'" Gonzales v. United States, 348 U.S. 407, 416 (1955). See, e.g. United States v. Abilene & Southern Railway Co., 265 U.S. 274, 286-290 (1924). This sort of procedure not only offends "'the rudiments of fair play,'" West Ohio Gas Co. v. Public Utilities Commission (No. 1), supra, at 71, but also so completely disables counsel from effective representation of his client on the death penalty issue that it destroys the Sixth Amendment right "in any substantial sense," Powell v. Alabama, 287 U.S. 45, 58 (1932). Cf. Ferguson v. Georgia, 365 U.S. 570

(1961); Brooks v. Tennessee, 406 U.S. 605 (1972).[49]

Second, the "similar cases" used by the Georgia Supreme Court for comparison under its statutory mandate consist largely (13 of the 14 cases cited in the "Cases Considered" appendix to the Georgia Supreme Court's opinion in petitioner's case)[50] of sentences meted out by Georgia juries and judges in capital cases prior to Furman -- that is, during a time when, as this Court has already decided, wholly arbitrary capital sentencing discretion was being exercised. Such a practice "calls to life the very conditions which [Furman purported] . . . to destroy," Guinn v. United States, 238 U.S. 347, 361 (1915), and is therefore unconstitutional. Cf. Lane v. Wilson, 307 U.S. 268 (1939).

Third, the universe of cases used for comparison is manifestly irrational. Those cases consist of capital prosecutions in which "records" are available -- which means, as a practical matter, only prosecutions in which appeals were taken, since the

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49/ It is true that this denial occurs at what is nominally the appeal, rather than the trial, of a capital prosecution. However, as was pointed out at p. 50, supra, Georgia procedure makes the Georgia Supreme Court the court of first resort, as well as the court of last resort, for presentation and decision of questions of comparison between a capital defendant's case and "similar cases" for death-sentencing purposes; and it is not conceivable that the Sixth and Fourteenth Amendments could fail to require effective assistance of counsel at this literally vital juncture.

50/ See note 35, supra.

stenographic notes of trial testimony are not transcribed except in the event of an appeal. The upshot is that one capital defendant convicted and sentenced to die may secure a reversal of his death sentence by the Georgia Supreme Court because his case is factually akin to two or three others in which convictions resulting in life sentences were appealed to that Court; whereas another condemned defendant will not secure the reversal of his death sentence notwithstanding the close factual similarity of his case to two or three unappealed convictions resulting in life sentences -- the critical difference in the comparative base depending entirely upon the fortuitous existence of appealable issues relating to guilt in various capital cases with which the particular defendant whose life is at stake has no connection.

Furthermore, in the matter of comparison the cards are stacked in favor of death because the new Georgia statute requires factual findings and a trial judge's report only in cases where a death sentence is imposed, so that the record is more complete in death cases than in life cases whose similarities to a particular condemned defendant's case may be concealed by the absence of findings resolving evidentiary disputes. And, although the Georgia statute requires comparison with "similar cases, considering both the crime and the defendant," Ga. Code Ann., §27-2537(c)(3), the great bulk of cases used for comparative purposes on petitioner's appeal were pre-Furman cases tried under an unitary trial procedure in which evidence relating to "the defendant" apart from "the crime" was admitted haphazardly and

fortuitously in some prosecutions and entirely excluded in others. See, e.g., Knowlton, Problems of Jury Discretion in Capital Cases, 101 U.PA. L. REV. 1099 (1953); Handler, Background Evidence in Murder Cases, 51 J. CRIM. L., CRIM. & POL. SCI. 317 (1960).

These practices raise significant constitutional issues because the Equal Protection Clause denies "to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute," Reed v. Reed, 404 U.S. 71, 75-76 (1971); see also, e.g., Baxstrom v. Herold, 383 U.S. 107 (1966); James v. Strange, 407 U.S. 128 (1972); and the Due Process Clause forbids adjudication of substantial rights on the basis of factual determinations that are not rationally related to the purposes for which the adjudication is made, e.g., Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Leary v. United States, 395 U.S. 6 (1969); Turner v. United States, 396 U.S. 398 (1970). It is no answer to the guarantees of these Clauses that it may be easier or cheaper for the State to make irrational judgments than to undertake the trouble of making rational ones. Rinaldi v. Yeager, 384 U.S. 305 (1966); and see Memorial Hospital v. Maricopa County, 42 U.S.L.W. 4277 (U.S., February 26, 1974). Most imperatively where human life is at issue, a State's procedures for determining when it shall be taken away are required by the Constitution to

exhibit some rational relationship to their professed objectives. If the objective of Georgia's appellate review procedures in capital cases is what the State professes -- to assure regularity and even-handedness in death sentencing and thus to terminate the earlier Georgia practice under which there existed "no meaningful basis for distinguishing the few cases in which [the death penalty was] . . . imposed from the many cases in which it [was] . . . not," Furman v. Georgia, 408 U.S. 238, 313 (1972) (Mr. Justice White, concurring), then the form of those review procedures is palpably irrational in the light of that objective. The only other objective in view -- one to which, admittedly, the new review procedures are quite rationally related -- is to create the appearance of regularity without its reality and thereby to evade Furman's command. See pp. 19-46, supra.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF TWO VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

During the selection of the jury which found petitioner guilty of the crimes of rape and kidnapping and which imposed a death sentence for both crimes, the State was permitted to challenge two veniremen for cause on the ground of scruples against the death penalty. The first venireman was excluded on the basis of [51]

51/ The number of veniremen wrongfully excluded on account of scruples against the death penalty is irrelevant. As the Fifth Circuit observed,

> "The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society; indeed, many agree on moral or religious grounds that it is incomprehensible that an advanced society such as ours should yet engage in such practice. Given the weightiness of the subject involved it really does not follow that the improper exclusion of a relatively small number of the total veniremen examined does not prejudice the defendant's rights to an impartial cross-section of the community. Where, as here, unanimity of decision is required to impose the death sentence, the stark reality is that one improperly excluded juror may mean the difference between life or death for a defendant. Although a defendant certainly has no assurance that a properly-empaneled jury will not impose the death penalty, it seems to us that in light of the vast difference in treatment which may result from the improper exclusion of a single venireman, even that degree of error is prejudicial to the rights of a defendant in a capital case." Marion v. Beto, 434 F.2d 29, 32 (CA5 1970).

This Court has reversed convictions when only three veniremen were wrongfully excluded, Segura v. Patterson, 403 U.S. 946 (1971), rev'g, 402 F.2d 246 (CA10 1968); Ladetto v. Massachusetts, 403 U.S. 947 (1971), rev'g 254 N.E.2d 415 (1969), and a number of other courts have held that the wrongful exclusion of only one venireman was reversible error. Woodards v. Maxwell, 303 F. Supp.

the following examination:

> "MR. NEUGENT [the District Attorney]: . . . Are you conscientiously opposed to capital punishment?
> If so, please stand.
> (One juror stood).
> Sir, are you so conscientiously opposed to capital punishment that,under no circumstances,could you conscientiously consider the imposition of the death penalty in a case in which aggravating circumstances were proven to your satisfaction beyond a reasonable doubt?
> THE JUROR: Yes, sir.
> MR. NEUGENT: You could not under any circumstances even consider the imposition?
> THE JUROR: No, sir.
> MR. NEUGENT: Judge, I would have to challenge him for cause.
> MR. ENGLISH [defense counsel]: I object to his challenge as for cause. Who is the juror?
> THE CLERK: W. E. Kretlow.
> MR. NEUGENT: Judge, Mr. Kretlow has stated that he would not consider the imposition of the death penalty. He was assuming that the statutory aggravating circumstances will prove dissatisfaction [sic] -- so, I have no choice.
> THE COURT: All right, under those circumstances he would be excused.
> (The juror, Mr. W. E. Kretlow, thereupon was excused)." (T. 4-5.)

The other death-scrupled venireman was excused for cause after the following questioning:

51/ cont'd.

690 (S.D. Ohio 1969); People v. Schader, 80 Cal. Rptr. 1, 457 P.2d 841 (Sup. Ct. 1969); In re Hillery, 79 Cal. Rptr. 773, 457 P.2d 656 (Sup. Ct. 1969).

> "MR. NEUGENT: . . . Are you conscientiously opposed to capital punishment? If so, please stand.
> (One juror stood).
> MR. NEUGENT: Sir, are you so conscientiously opposed to the imposition of the death penalty that, assuming the State produces and adduces and proves to your satisfaction beyond a reasonable doubt, that the aggravating circumstances of the Statutory provisions alleged thereto prove that[sic] you could not even consider the imposition of the death penalty in any capital felony case?
> (The reporter did not hear an answer).
> MR. NEUGENT: Let the record indicated[sic] that the juror nodded his head indicating that you could not, is that true?
> THE JUROR: Yes, sir. (Nodding assent).
> THE COURT: Get his name.
> THE CLERK: W. H. Day.
> MR. NEUGENT: I wanted the Clerk to make a note of that.
> THE COURT: Well, the Court Reporter got his name.
> MR. ENGLISH: I object to the challenge, of course, in light of the questions being asked the juror.
> MR. NEUGENT: Will the Court rule on that?
> THE COURT: Well, I'll let him be challenged for cause.
> MR. NEUGENT: You may be excused.
> (Thereupon the juror was excused)." (T. 12-13.)

The Georgia Supreme Court held that it was not error to excuse these veniremen for cause:

> "It is unmistakably clear from their answers that [these two veniremen] . . . would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed in the case. Under Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770, 20 LE2d 776), it was not error to dismiss these jurors." (Eberheart v. State, __Ga.__, 206 S.E.2d 12,15-16(1974)(App.A at 4a-5a)).

That holding presents issues of general significance which should be determined by this Court.

A. Exclusion from the Jury Which Decided Petitioner's Guilt of Veniremen with Conscientious Scruples Against the Death Penalty Violated Petitioner's Rights Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Georgia's new bifurcated-trial statute governing capital sentencing does not require or express a preference that the sentencing jury be identical with the jury which determines guilt or innocence.[52/] Systematic exclusion of the entire class of death-scrupled jurors at the guilt phase of a capital trial would be supportable consistently with the constitutional command of a jury "truly representative of the community," Smith v. Texas, 311 U.S. 128, 130 (1940), only if such jurors were, for some reason, legitimately to be deemed disqualified or unfit to sit on questions of guilt/innocence. Cf. Witherspoon v. Illinois, 391 U.S. 510 (1968). It might be urged that they are, because their scruples might preclude their finding guilt in any case where another jury might subsequently impose the death penalty. The trouble with this supposition is that there is absolutely no evidence to support it as a characterization of the frame of mind or probable behavior of the excluded veniremen in this case. As has been demonstrated at pp. 32-36, supra, the sentencing jury has complete freedom to sentence a convicted defendant to death or to spare his life. Since a guilty verdict nowise

52/ Some of the new post-Furman capital punishment statutes which provide for bifurcated proceedings explicitly require these two juries to be identical unless circumstances make this impracticable. E.g. Cal.Penal Code §190.1(1974): "If the defendant was convicted by a jury, the trier of fact [at the sentencing stage] shall be the same jury unless, for good cause shown, the court discharges that jury, in which case a new jury shall be drawn . . . ." See People v. Gonzales, 66 Cal.2d 482, 58 Cal. Rptr. 361, 426 P.2d 929,939 (1967).

requires a death sentence under Georgia law, it appears unduly doctrinaire to assume without inquiry that a juror with sentiments against the death penalty would feel constrained to shape his vote at the guilt-finding stage in light of these sentiments.

In constitutional matters of this sort, neither untested speculations nor approximative rules of thumb can be made to support the denial of individual rights. At stake here is the right to a fair trial and, in the final analysis, the most precious and fundamental of human values -- life itself. "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." Harper v. Virginia Board of Elections, 383 U.S. 663, 670 (1966). In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Court struck down a compulsory sterilization law on equal protection grounds where the criteria for sterilization arbitrarily included some individuals and excluded others:

> "We are dealing here with legislation which involves one of the basic civil rights of man . . . . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty . . . . [S]trict scrutiny of the classification which a State makes in [such] . . . a law is essential . . . ." (Id. at 541.)

Under appropriately "strict scrutiny," a practice which systematically excludes jurors from trying guilt solely because of their attitudes toward penalty surely raises grave questions that this Court should resolve. We may assume that a State could exclude from juries sitting on the guilt question in a capital case any person whose attitude toward the death penalty is such that he or she cannot fairly pass on the issue of guilt

of the accused. But that assumption does not justify the State's making the further assumption that all scrupled persons would function in this fashion; nor does it absolve the State from making a pertinent and practicable inquiry into fitness before it presumes to sweep from juries a significant portion of the whole community on the theory that it is unfit. This uncritical and unrebuttable presumption that a widely shared and reasonable attitude on the penalty question will affect the juror's performance of his civic duty on the guilt issue is to all appearances constitutionally arbitrary. The Court should therefore grant review here to decide whether any such presumption will support the exclusion of death-scrupled jurors from the guilt-determining jury, or whether that wholesale exclusion -- which both deprives the accused of a jury that is a "cross-section of the community," Labat v. Bennett, 365 F.2d 698, 723 (CA5 1966), and forces upon him a jury composed of persons whose characteristics tend to impugn "the fairness of the trial," ibid. -- is violative of equal protection and due process.

B. The Test of Exclusion Used Below Failed to Satisfy the Minimum Standards for Death-Qualification Required by the Constitution of the United States as Construed in Witherspoon v. Illinois, 391 U.S. 510 (1968).

A number of questions concerning the applicability of Witherspoon v. Illinois, 391 U.S. 510 (1968) are presented by this case, for that decision held that "[i]f the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than [that outlined in Witherspoon]. . . , the death sentence cannot be carried out." 391 U.S. at 522 n.21 (emphasis added). See also Maxwell v. Bishop, 398 U.S. 262, 266 (1969); Boulden v. Holman, 394 U.S. 478, 482 (1968); Mathis v. New Jersey, and companion cases, 403 U.S. 946-948 (1971).

First, this Court should determine whether scruples against the imposition of capital punishment in all circumstances can be made "unmistakably clear," as required by Witherspoon, 391 U.S. at 522, n.21, in the absence of an instruction by the trial court that it is the civic duty of each venireman to sit as a juror if he possibly can. As the Court declared in Boulden v. Holman, supra, at 483-484:"[I]t is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." A venireman must be instructed that the law requires him to "subordinate his personal views to what he . . . .[perceives]

to be his duty to abide by his oath as a juror and to obey the law of the State," Witherspoon v. Illinois, supra, at 514-515 n.7. Although the excluded veniremen here stated, without more, that they would not consider a verdict which entailed the imposition of the death sentence, neither of them was given any instruction on his duty to consider such a verdict or asked whether he could subordinate his initial instincts to the law of Georgia that the trial court would charge him to obey.

Second, the questioning of these two veniremen was calculated to confuse them as to their exact duty under the new Georgia statute. They were not instructed that they would have a dual role and would be responsible for determining guilt and sentence separately. They were not asked whether their scruples would interfere with the determination of petitioner's guilt under a procedure in which a guilty verdict does not necessarily entail the death sentence. Although the questions asked of each veniremen implied that if aggravating circumstances were proved beyond a reasonable doubt, a juror would be required to vote for the death penalty, the new Georgia capital punishment statute does not require the imposition of a death sentence if the statutory aggravating circumstances, or any aggravating circumstances, are proved to this degree of certainty. A Georgia sentencing jury is free to disregard aggravating circumstances and to "express the conscience of the community" (Witherspoon v. Illinois, supra at 519-520) in sparing the defendant's life. See p.32 supra. Had these veniremen been properly instructed, they might well have found that their capital punishment scruples were not of a nature to prevent

them from serving on petitioner's jury, since they had a statutory power to recognize an unlimited range of mitigating circumstances.

Finally, the examination of these veniremen was too brief and abstract to discover accurately their true feelings and beliefs concerning capital punishment. Despite general expressions of sentiment against the death penalty, it may still be possible for a venireman "to follow conscientiously the instruction of a trial judge and . . . consider fairly the imposition of the death sentence in a given case." Witherspoon v. Illinois, supra at 522. Something more than a few perfunctory and mechanical questions is necessary to demonstrate that a venireman's sentiments are "unmistakably clear" for Witherspoon purposes. 53/

53/ The Court has found that exclusion for cause of veniremen on the basis of the following interchanges was reversible error:

"Q. Do you entertain any conscientious scruples about imposing the death penalty?
A. Yes, I am afraid I do."
Maxwell v. Bishop, 398 U.S. 262, 264 (1970).

"Q. Mr. Adams, do you have any feeling concerning capital punishment that would prevent you or make you have any feelings about returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence?
A. No, I don't believe in capital punishment."
Maxwell v. Bishop, supra at 265 (emphasis omitted).

"The Court: Do you have a fixed opinion against capital punishment?
Mr. Seibert: Yes, sir.
Mr. Hundley: We challenge.
The Court: Defendant?
Mr. Chenault: No questions.
The Court: Stand aside. You are excused."
Boulden v. Holman, 394 U.S. 478, 483 (1969).

cont'd.

Yet nothing more was asked here. Veniremen Kretlow and Day voiced unexamined sentiments against capital punishment, but they did not indicate, and they were not asked, whether their opposition to capital punishment stemmed from inflexible moral principles or from more tentative beliefs in the social inutility of the penalty, whether this opposition was firmly rooted or amenable to persuasion, whether their beliefs might yield to facts or argument, and whether each venireman believed he had a right to act according to his private moral beliefs if other members of the jury were persuaded to accept the death penalty authorized by the laws of Georgia.

53/ cont'd.

"The Court: Do you have a fixed opinion against capital punishment?
Mr. Moon: Capital punishment.
The Court: You mean you would never inflict the death penalty on [sic] any case?
Mr. Moon: That's right.
Mr. Hundley: Challenge.
Mr. Chenault: No questions.
The Court: Stand aside, Mr. Moon."

Boulden v. Holman, supra at 483 n. 6.

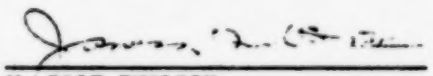
C. The Exclusion of Veniremen with Conscientious Scruples Against Capital Punishment Deprived Petitioner of his Sixth Amendment Right to a Representative Jury.

In order to avoid burdening the Court with repetitious matter, petitioner adopts the portion of the "Reasons for Granting the Writ" section of the Petition for Certiorari to the Supreme Court of North Carolina in Noell v. North Carolina, No. 73-6876 (filed June 11, 1974), at pp. 28-32, which presents the question whether the exclusion for cause of veniremen with conscientious or religious scruples against the death penalty violates the Sixth Amendment right of a capital defendant to a jury selected from a panel which reflects a fair and representative cross-section of the community, guaranteed in state criminal cases by Duncan v. Louisiana, 391 U.S. 145 (1968), and subsequent decisions. For the Court's convenience, the referenced portion of the Noell petition is reproduced as Appendix D, infra, pp. 1d-5d.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,



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